

Statement
of
The Honorable Steven R. Blust
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Before the
Antitrust Modernization Commission

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Chairwoman Garza, Vice Chairman Yarowsky and distinguished members of the Antitrust Modernization Commission (AMC), good afternoon. My name is Steve Blust and I am Chairman of the Federal Maritime Commission. I am pleased to discuss with you today the Federal Maritime Commission's (FMC or Commission) oversight of agreements between and among ocean common carriers and U.S. marine terminal operators under the Shipping Act. I believe that the Shipping Act and its recent modifications are working as they were intended by Congress. To the extent that any future reforms may prove warranted, Congress has provided the FMC with exemption authority that can be, and has been, used for that purpose. I hope I can assist the AMC as it strives to fulfill its mandate by clarifying and elaborating on the FMC's controlling statutes and the state of international ocean shipping generally.

The Commission is the independent regulatory agency which administers the Shipping Act of 1984, most recently substantially amended by the Ocean Shipping Reform Act (OSRA) in 1998. 46 U.S.C. §§ 40101-41309.¹ The FMC was established as an independent agency in 1961 and has administered the Shipping Act, 1916 ("1916 Act") as well as the Shipping Act of 1984. Prior to 1961, the Shipping Act, 1916 was administered by three other agencies: Federal Maritime Board (1950 – 1961); United States Maritime Commission (1936-1950); and the United States Shipping Board (1916-1936). Significantly, the FMC's predecessor agencies were responsible for both the regulation of ocean commerce and promotion of the U.S. merchant marine. Congress divided those two functions in 1961, and tasked the FMC with sole responsibility for the regulation of international ocean commerce and the Maritime Administration with the promotion of the U.S. merchant marine.

¹ The citations contained herein reflect the codification of Title 46 by H.R. 1442, signed into law by the President on October 6, 2006.

The Commission is headed by five presidential appointees serving staggered five year terms. The FMC is currently operating with approximately 123 full-time employees and is funded at a level of \$20,294,010 for Fiscal Year 2006. Most of the agency's employees are in its Washington office, with area representatives in New York, Los Angeles, South Florida, New Orleans and Seattle.

The Commission's regulation of cooperative arrangements among ocean common carriers (also known as vessel-operating common carriers or VOCCs) and marine terminal operators (MTOs) ("agreements") is an important part of a comprehensive maritime economic policy established by Congress in the Shipping Act. As stated in the Shipping Act, that comprehensive policy has several aims:

- to establish and promote a nondiscriminatory regulatory process;
- to provide an efficient and economic transportation system that is in harmony with and responsive to international shipping practices;
- to encourage the development of an economically sound U.S. flag liner fleet capable of meeting national security needs; and, finally,
- to promote the growth and development of U.S. exports through competitive and efficient ocean transportation. 46 U.S.C. § 40101.

The FMC is also authorized to protect the shipping public by taking actions to correct unfavorable shipping conditions in the waterborne U.S. foreign commerce, whether caused by the actions of carriers or foreign governments, pursuant to section 19 of the Merchant Marine Act, 1920, 46 U.S.C. §§ 42101-42109, and the Foreign Shipping Practices Act of 1988, 46 U.S.C. §§ 42301-42307. Also, the Commission assures that passenger vessel operators provide evidence of financial responsibility to indemnify passengers for personal injury or death or to

refund passenger fares for nonperformance of a cruise. 46 U.S.C. §§ 44101-44106.

Immunity from the antitrust laws for cooperative agreements under the Shipping Act today differs dramatically from the immunity regime laid out under the 1916 Act. For example, agreements prior to 1984 were given limited immunity only if the agreement parties demonstrated to the Commission, after an often lengthy process, that their agreement was in the public interest. These agreement filings were often challenged, not by customers but by competitors. Also under the 1916 Act, all carriers were required to adhere to common carrier principles and strictly charge the rates in tariffs which were required to be filed with the FMC. Moreover, the 1916 Act did not prohibit conference agreements from denying member lines the right to take “independent action” from conference established rates.

Congress completely changed this regime in 1984.² The Shipping Act of 1984 sharply altered the nature of the limited immunity and greatly reduced the time within which agreements became effective from that which existed under the 1916 Act. The Shipping Act used a Hart-Scott-Rodino model for agreement effectiveness, whereby agreements would become effective forty-five days after filing unless the Commission takes action to prevent them from doing so. This change shifted the emphasis from pre-effectiveness review to ongoing monitoring of the impact of filed agreements as implemented. Further, conferences were prohibited from denying member lines the right to take action deviating from conference tariff rates or service items.

In 1984, service contracts between shippers and individual carriers or conferences permitted some differentiated treatment of shippers, but common carriage remained substantially

² Section 18 of the Shipping Act of 1984 also mandated that five and one-half years after its enactment an Advisory Commission on Conferences be established to “conduct a comprehensive study of, and make recommendations concerning, conferences in ocean shipping; and specifically address whether the nation would be best served by prohibiting conferences, or by closed or open conferences.” The ACCOS Report included an analysis of antitrust immunity and the conference system. Report of the Advisory Commission on Conferences in Ocean Shipping, April 10, 1992.

intact as such contracts were required to be afforded to all “similarly situated shippers.” This was significantly changed by OSRA.

OSRA, effective in May 1999, was Congress’s modernization of antitrust issues with respect to liner shipping and U.S. marine terminal operators and the most recent deregulatory step in what amounts to two decades of researching, debating, and revising the limits of Shipping Act antitrust immunity. The regulatory changes introduced by OSRA have been remarkably successful in achieving the legislative intent of Congress, and removed many of the major concerns that the affected parties (shippers, ocean transportation intermediaries, U.S. ports, U.S. maritime labor organizations, and ocean common carriers) had about the 1984 Act’s original regulatory structure. In crafting OSRA, Congress well understood that in a dynamic, international industry like liner shipping, additional future efficiency-enhancing, pro-competitive reforms might be warranted and desirable. Consequently, Congress specifically provided for the FMC to identify, evaluate and introduce such reforms without forcing interested parties to seek legislative intervention. The Shipping Act specifies that the Commission “may by order or regulation exempt for the future any class of agreements between persons subject to [the Act] or any specified activity of those persons from any requirement of [the Act] if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.” 46 U.S.C. § 40103. In effect, Congress has said that if and when future reforms may appear warranted, the FMC should, where appropriate, use its exemption authority to promote such reforms.

The limited antitrust immunity contained in the Shipping Act extends to carrier operational agreements that enhance efficiency and maintain competition by acting as a constraint on industry mergers and acquisitions, and to marine terminal agreements that promote

landside transportation efficiency, reduce costs, facilitate projects designed to reduce congestion in and around port cities, promote environmental clean-up measures, and help fund critical freight infrastructure. The impact of this immunity is mitigated by several realities:

1. most cargo moves under individual, confidential service contracts, rather than by conference or individual tariff rates;
2. there is significant competition in the ocean transport industry;
3. agreements filed with the Commission are publicly available; and
4. such cooperation is subject to a well-established system of regulation enforced by an expert, independent federal agency.

Antitrust Immunity under the Ocean Shipping Reform Act

Sections 4 and 5 of the Shipping Act, now codified at 46 U.S.C. §§ 40301-40303, require all agreements among ocean common carriers in U.S. foreign oceanborne commerce permitting concerted activities involving rates, service, capacity or division of markets to be filed with the Commission. Agreements among MTOs (and among MTOs and ocean common carriers) to regulate rates or services, or engage in other exclusive, preferential or cooperative working arrangements, must also be filed with the Commission. Once effective, the parties to the agreements receive a limited grant of immunity from otherwise applicable antitrust laws for activities authorized by their agreements. 46 U.S.C. § 40307.

Pursuant to its regulatory process, the Commission has categorized agreements based on their potential for competitive impact. The first, and most heavily regulated, category includes pricing agreements, either among VOCCs or MTOs (or both), where the main focus is the discussion and/or agreement on policies with respect to pricing. The most common types of agreements with such authority are conferences and voluntary rate discussion agreements.

Conferences are defined by the Shipping Act as those agreements which provide for the collective discussion, agreement, and establishment of ocean freight rates and practices by groups of VOCCs. Conferences publish a common rate tariff in which all the parties participate. 46 U.S.C. § 40102(7). Currently, there are eight VOCC conference agreements on file with the Commission.³ See Appendix A (describing currently filed agreements).

Discussion agreements with rate authority focus on the members' pricing practices, but any consensus reached under these agreements is non-binding on the parties; each party publishes its own tariff. In addition to non-binding agreements on rates to be reflected in members' individual tariffs, discussion agreements may adopt "voluntary service contract guidelines," relating to terms and procedures of service contracts. Voluntary guidelines must be filed with the Commission, but are accorded confidentiality by statute. There are also non-rate discussion agreements, which are not geared to rate matters, but generally provide a forum for discussing matters of mutual interest; in some instances, they operate much like a trade association. There are currently 29 rate discussion agreements and eight non-rate discussion agreements on file with the Commission.

Vessel-sharing agreements (VSAs), alliances and other operational agreements make up the largest group of VOCC agreements on file with the Commission comprising approximately 74% of the agreements currently on file. These agreements range from those that involve a high degree of operational cooperation with respect to space and services down to the simple swap of container slots. At one end of the spectrum of these agreements are the so-called "alliances," with a substantial degree of operational integration of vessels and terminals on multiple trade

³ They are: Trans-Pacific American Flag Berth Operators Agreement, New Zealand/United States Container Lines Association, Trans-Atlantic American Flag Liner Operators, Israel Trade Conference, Trans-Atlantic Conference Agreement, Australia/United States Containerline Association, South America Independent Lines Association, and the Inland Shipping Service Association.

lanes, while at the low end are routine space charters and slot swaps. Most VSAs authorize some level of service rationalization; of a total of 155 VSAs currently on file with the Commission, eight have the authority to discuss rate matters. The objective of these agreements is to improve the scope and quality of the lines' service offerings, while limiting the individual members' operating costs. Joint service agreements allow the parties to operate a joint venture under a single name in a specified trading area. The joint venture issues its own bills of lading, sets its own rates, and acts as an individual ocean common carrier.

Finally, there are many other agreements which do not fit under any of the foregoing agreement types. These cooperative working arrangements, 46 U.S.C. § 40301(a)(5), b(2), generally deal with unique management arrangements between carriers, sharing administrative services, agency, transshipment, and equipment interchange agreements.

The Extent of Shipping Act Antitrust Immunity

The Shipping Act provides that, once effective, the above types of cooperative arrangements are immunized from prosecution under the antitrust laws. 46 U.S.C. § 40307. Furthermore, this immunity is specifically limited by the Shipping Act; none of the following cooperative arrangements are immunized, regardless of whether they are filed with the Commission:

- any agreement with or among air carriers, rail carriers, or common carriers by water not subject to the Shipping Act with respect to transportation within the United States (46 U.S.C. § 40307(b)(1));
- any discussion or agreement among common carriers that are subject to the Shipping Act regarding the inland divisions (i.e., the amount paid by a common carrier to an inland

carrier for the inland segment of through transportation offered to the public by the common carrier) of through rates within the United States (46 U.S.C. § 40307(b)(2));

- any maritime labor agreements or matters relating to such agreements (46 U.S.C. § 40102(1)(B));
- any agreement among common carriers subject to the Shipping Act to establish, operate or maintain a marine terminal in the United States (46 U.S.C. § 40307(b)(3)); or
- any contract with a VOCC or agreement by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or agreement and the contract provides for a deferred rebate (“loyalty contract”) (46 U.S.C. § 40307(b)(4)).

Acquisitions are also outside the limited immunity provided by the Shipping Act. 46 U.S.C. § 40301(c).

Further, the Shipping Act contains prohibitions on what any conference or group of common carriers may do.⁴ There are prohibitions against concerted boycotts or unreasonable refusals to deal, conduct that unreasonably restricts the use of intermodal services or technological innovations, predatory practices against competitors, denying compensation to OTIs, allocating shippers, and discriminating against shippers on the basis of their status as OTIs or shippers’ associations. 46 U.S.C. § 41105. The immunity has been interpreted narrowly. United States v. Gosselin Worldwide Moving, 411 F.3d 502 (4th Cir. 2005)(two NVOCCs not immunized from criminal antitrust prosecution by sections 7(a)(2)(B), 7(a)(4) or 7(c) of the Shipping Act).

⁴ Common carriers regulated by the FMC are also prohibited on an individual basis, from, *inter alia*: charging inapplicable rates; operating under unfiled agreements; retaliating against shippers; engaging in unfair or unjustly discriminatory practices with respect to any port; paying deferred rebates; using predatory practices to drive competitors out of a trade; unreasonably refusing to deal or negotiate; doing business with unbonded intermediaries; disclosing business information to the detriment of a shipper; or failing to observe just and reasonable practices. 46 U.S.C. §§ 41102(c), 41103, 41104.

Review and Monitoring of Agreements

Agreements filed with the Commission are reviewed and monitored on an on-going basis by the Commission's Bureau of Trade Analysis (BTA), a staff of expert trade specialists and maritime economists. Over the past five years, an average of 252 agreements and modifications have been filed and reviewed annually by the Commission; in FY2006, the Commission received 284 such filings.

As noted above, modeled on the Hart-Scott-Rodino pre-merger review, a Shipping Act agreement generally becomes effective forty-five days after filing, unless it is rejected by the Commission for technical deficiency (46 U.S.C. § 41304(b)), made the subject of a formal Commission request for additional information (46 U.S.C. § 40304(d)), or enjoined by the U.S. District Court for the District of Columbia (46 U.S.C. § 41307(b)) when the Commission can demonstrate that the agreement is likely to produce an unreasonable increase in transportation cost or an unreasonable decrease in transportation service by reason of a reduction in competition. 46 U.S.C. § 41307(b) ("section 6(g)").

The Commission regularly uses the pre-effectiveness period to encourage parties to correct technical deficiencies, substitute clarifying language for vague or confusing language, and to amend provisions with potentially unacceptable anticompetitive effects under the section 6(g) standard described above. Necessary adjustments to agreements are generally made during the pre-effectiveness period with a minimum of procedural delay and legal expense to the industry. As such, to date the Commission has not found it necessary to resort to a petition for injunctive relief under section 6(g), either prior to an agreement becoming effective or at any time during its effectiveness.

The Commission has other tools under the Shipping Act to address agreement activities which may violate the Act. The Commission is authorized to initiate investigations with respect to actions by agreement parties which violate the Act as well as disapprove, cancel or modify any agreement found to violate the Act. 46 U.S.C. § 41302. The Commission may also compel common carrier agreement parties to provide information on any matter pertaining to the business of that common carrier. 46 U.S.C. § 40104.⁵

The Commission requires the filing of substantial information regarding the participants' market share and service plans when an agreement is filed, in order to permit a thorough review ("Information Forms"). 46 CFR Part 535. In addition, the Commission requires periodic reporting of information concerning on-going activities under certain classes of agreements once an agreement becomes effective, such as minutes of meetings of conferences or discussion agreements or periodic monitoring reports for such agreements as well as significant VSAs and alliances. This ongoing monitoring enables the Commission to carry out its responsibility for

⁵ The Commission took that course in 2003 when it initiated Fact Finding Investigation No. 25 - Practices of Transpacific Stabilization Agreement Members Covering the 2002-2003 Service Contract Season. That proceeding was initiated in response to a joint petition filed by the National Customs Brokers and Forwarders Association of America, Inc. and the International Association of NVOCCs. The petitioners requested the Commission act against a carrier rate discussion agreement, the Transpacific Stabilization Agreement (TSA), relative to practices involving the discussion and agreement on rates and negotiation of service contract terms particularly affecting non-vessel operating common carriers (NVOCCs). On its own motion, however, the Commission broadened the scope of the investigation to include issues involving information sharing among TSA members, TSA's exercise of market power through its ability to agree on rates as well as capacity, and the extension of that power through related agreements. The evidence gathered pursuant to Fact Finding No. 25 resulted in a settlement agreement with the major ocean carrier agreements and their members who serve the inbound waterborne U.S. trades with Asia, including the TSA and two TSA-related bridging agreements. Pursuant to the settlement, the agreement parties removed agreement authority to discuss or agree upon capacity rationalization, and TSA members agreed to refrain from filing any other agreement to discuss or agree upon capacity rationalization, prohibited the exchange of shipper-specific information relating to individual service contracts and limited discussions of rates or capacity to meetings for which minutes are filed with the Commission. The market power of TSA was reduced by the deletion of the Indian subcontinent trades from the scope of TSA. The settlement also requires semi-annual meetings of TSA and Commission representatives thereby establishing an additional mechanism through which the Commission carries out ongoing oversight of agreement activities.

continuing oversight of carriers' concerted activities within the limited antitrust immunity conferred by the Shipping Act.

Recent Pro-competitive Changes: Law and Regulation

As noted above, significant pro-competitive changes were made to the Shipping Act by OSRA. The most notable of these was the shift away from public tariffs and publicly available contract rates to the confidential rates in individually negotiated service contracts. This significant change was accompanied by prohibitions limiting conferences' ability to enforce rate adherence by their members; OSRA now prohibits conferences from preventing or impeding member lines' individual contract negotiations with shippers. Further, a common carrier agreement cannot compel member lines to reveal information related to individual contract negotiations. OSRA also liberalized independent action allowances that conferences must make.

Since 1999 the Commission has revised and updated its rules on its own motion to modernize, streamline and focus its review and monitoring of agreements. On October 27, 2004, the Commission adopted a Final Rule to amend its regulations on the filing of ocean common carrier and marine terminal operator agreements, and the reporting requirements for those agreements. 69 Fed. Reg. 64298 (November 4, 2004). These revisions modified the monitoring reports and clarified the minutes filing requirements for agreements that included any kind of pricing authority. Carrier agreements of less than 30% market share that do not include any pricing or capacity rationalization authority are now effective upon filing.

OSRA also augmented the Commission's ability to make de-regulatory changes itself by amending the Commission's exemption authority. 46 U.S.C. § 40103 ("section 16"). In the Committee Report on the bill that was to become OSRA, the Commission was encouraged to "examin[e] through the regulatory process specific regulatory provisions and practices not yet

addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.” Report of the Senate Committee on Commerce, Science and Transportation on S. 414, S. Rep. No. 61, 105th Cong., 1st Sess., July 31, 1997 at 30. The Commission may “exempt for the future any class of agreements between persons subject to [the Shipping Act] or any specified activity of those persons from any requirement of [the Shipping Act] if [it] finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.” 46 U.S.C. § 40103.

The Commission has used its exemption authority to institute pro-competitive reforms as recently evidenced by an exemption from tariff publication and adherence requirements granted to NVOCCs. On January 19, 2005, the Commission’s exemption for Non-Vessel-Operating Common Carrier Service Arrangements became effective. 46 CFR Part 531. While OSRA had expanded the types of entities which may be party to a service contract,⁶ it only extended confidential service contracting authority to one type of common carrier, namely, VOCCs. NVOCCs continued to have only one method of pricing with their shipper customers, through a publicly-available tariff. The Commission determined that it could exempt NVOCCs from the requirements of the Shipping Act that all common carriage be provided in accordance with the terms and conditions of the public tariff. Instead, NVOCCs are now permitted to enter into confidential arrangements in much the same way that VOCCs do with their shipper-customers. As a result of this exemption, NVOCCs can enter into NVOCC Service Arrangements (“NSAs”), which permit NVOCCs and their shipper customers to confidentially agree upon the rates to be charged for international oceanborne transportation. As a condition for entering into an NSA,

⁶ Prior to OSRA only VOCCs and conferences (on the carrier side) and shippers (including NVOCCs) or shippers’ associations could enter into service contracts. OSRA added agreements between VOCCs on the carrier side and unaffiliated shippers on the shipper side to this list. 46 U.S.C. § 40102(20) (definition of “service contract”).

these arrangements must be filed in the FMC's secure, confidential, internet-based "SERVCON" system. Rates in NSAs may be kept confidential by the parties if they are filed with the FMC.⁷

Changes in the Industry Since 1998

In September 2001, the Commission released a comprehensive study on the regulatory and economic impact of OSRA on the U.S. ocean liner industry during the first two years of its implementation. Federal Maritime Commission, Impact of the Ocean Shipping Reform Act of 1998, September 2001 ("OSRA Report"). In the area of agreements, the OSRA Report noted a number of significant changes: the deregulatory nature of OSRA, rapidly expanding global trade volumes, and the improved service of traditionally non-conference carriers, have contributed to the restructuring of the U.S. liner shipping industry. OSRA Report at 24-30. Broad-based rate discussion agreements with non-binding ratemaking authority have essentially replaced traditional conferences as the primary forum for collective carrier pricing activity in most U.S. liner trades. There are currently 29 VOCC rate discussion agreements on file with the Commission. See Appendix A.

Rate discussion agreements provide members with the opportunity to exchange commercial information and, on a voluntary basis, discuss market conditions and pricing policy. Unlike conferences, which saw a marked decline in their numbers (almost one-third either disbanded or were suspended following OSRA's implementation), the number of rate discussion agreements remained somewhat stable during the first two years of OSRA. As provided in Appendix A, there are a total of 47 filed agreements (these include conferences, rate discussion agreements, VSAs and joint services) that authorize some sort of sharing of rate information.

⁷ The FMC has made it easy and inexpensive for NVOCCs and their customers to use these new arrangements. To take advantage of the exemption provided for in 46 CFR Part 531, an NVOCC in compliance with the licensing, financial responsibility and tariff publication requirements of the Shipping Act needs to simply register to receive a password and system identifier, which in turn will permit the uploading of its NSAs.

Further, the number of efficiency enhancing operational agreements on file with the Commission continued to rise as carriers sought to maintain a competitive market position by expanding their individual service networks through cooperative arrangements. The trends described above have continued into 2006. Along with the decline of traditional rate-setting carrier conferences, there has been a notable rise in the use of creative cooperative arrangements to address infrastructure, equipment and environmental issues. The Commission has noted the use of agreements by VOCCs and MTOs to address infrastructure limitations and constraints, such as agreements to share chassis equipment, and to make technological advancements to provide better service to their customers, as in the internet portal agreements.⁸

Carriers and MTOs have also used agreements to address and coordinate their mutual efforts on the implementation of security measures. Recently several West Coast MTOs amended a general operational agreement to include the ability to collectively address port and inland congestion issues. Known as "PierPASS," MTO members of the West Coast MTO Agreement in the Ports of Los Angeles and Long Beach have agreed to a standard charge that has enabled each MTO to operate day and night shifts and has resulted in encouraging shippers to move their cargo in the off peak hours, thereby reducing congestion on the busy highways used by commuters and cargo movers alike. Similarly, in August, 2006, the Port Authorities of Los Angeles and Long Beach filed an agreement that includes authority to discuss rate issues, to coordinate their efforts to develop inland infrastructure and capacity.

Conclusion

The Shipping Act of 1984 as amended by OSRA and implemented by the FMC has created a regulatory environment that has successfully achieved Congress's intent and

⁸ These are, for example, the Global Transportation Network Agreement, under which VOCCs have cooperated to offer their customers a single website to access their service information.

contributed to today's relatively harmonious relationship between shippers and carriers. To the extent that shippers and carriers need help from Congress, it is with the pressing problems of the maintenance and expansion of freight infrastructure, the reduction of port-related congestion, and the environmental concerns related to international transportation. The Shipping Act is being utilized currently to provide the opportunity to discuss solutions that can make significant contributions in just these areas

Thank you for your kind attention. I will be happy to address any questions you may have.

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APPENDIX A

Agreements filed with the Federal Maritime Commission (as of October 1, 2006)

Agreements by type of participant:

MTO Agreements:

Total: 280

With pricing authority: Total: 18

Conference: 10

Discussion: 8

Without pricing authority: Total: 82

Assessment: 8

CWAs: 14

Services: 31

Joint ventures: 13

Cruise: 14

Non-rate disc. agreements: 2

Other (leases): 180

VOCC Agreements:

Total: 219

With pricing authority: Total: 47

Conference: 8

Discussion agreement: 29

Other : 10

Without pricing authority: Total: 172

Discussion agreement: 8

CWA: 12

VSA: 139

Other: 13